

***United States Court of Appeals  
for the Second Circuit***



**APPELLANT'S  
BRIEF**





**ORIGINAL**  
**75-1332**

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P/S

In The  
**United States Court of Appeals**

For The Second Circuit

No. 75-1332

UNITED STATES OF AMERICA,

*Plaintiff-Appellee.*

vs.

RONALD GIGLIOTTI,

*Defendant-Appellant.*

*On Appeal from the United States District Court for the Eastern  
District of New York*

**BRIEF FOR DEFENDANT-APPELLANT**

LA ROSSA, SHARGEL & FISCHETTI  
*Attorneys for Defendant-Appellant*  
522 Fifth Avenue  
New York, New York 10036  
(212) 687-4100

JAMES M. LA ROSSA  
GERALD L. SHARGEL

*On the Brief*

GUSTAVE H. NEWMAN  
522 Fifth Avenue  
New York, New York 10036  
*Of Counsel*

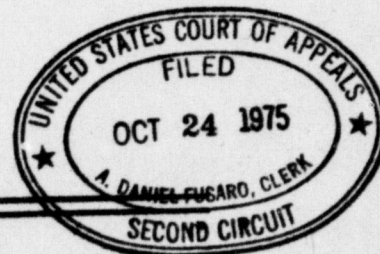


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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

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No. 75 - 1332

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UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-against-

CIRO RICCARDI and RONALD  
GIGLIOTTI,

Defendants-Appellants.

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BRIEF FOR APPELLANT  
RONALD GIGLIOTTI

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Preliminary Statement

The Appellant, Ronald Gigliotti, appeals from a Judgment of Conviction entered against him in the United States District Court for the Eastern District of New York, adjudging him guilty of one count of violating Title 18, United States Code, Section 894 relating to an alleged extortionate credit transaction. As a result of this conviction Appellant was sentenced to an eight year



term of imprisonment pursuant to Title 18, United States Code, Section 4208(a)(2). In addition, Gigliotti was fined in the sum of \$10,000. The Appellant is presently at liberty on bail pending this Appeal.

The Indictment appears on page 6 of Appellant's Appendix.

#### STATEMENT OF THE FACTS

The facts of this case may be briefly stated. The Government alleged that during 1971 and 1972, Frank DiPalma, a Transit Authority worker and small time book-maker (A 45 - 46)<sup>1/</sup> borrowed \$3500 from the defendant Ciro Riccardi at usurious rates of interest. The loan was made in three installments over a period of some nine months. (A 50 - 58)<sup>2/</sup> The case then followed a familiar pattern. DiPalma sunk deeper and deeper into debt. The \$3500 loan from Riccardi was not his only obligation. DiPalma had not only exhausted normal channels of credit but had borrowed heavily from relatives and friends. (A 60 - 61)

<sup>1/</sup> "T" refers to the trial transcript. References to Appellant's Appendix are introduced by the letter "A".

<sup>2/</sup> The defendant Ciro Riccardi was charged also in count 1 with making an extortionate extension of credit. He was, however, acquitted of this charge.

Borrowing, however, proved no solution to DiPalma's fiscal misfortune. This debtor-witness described himself as a "degenerate gambler". (A 5) Although receiving a net salary of only \$140 per week from the Transit Authority, DiPalma at the time he allegedly borrowed from Riccardi, was some \$12,000 to \$13,000 in debt. (A 62) As time wore on DiPalma's situation became increasingly more hopeless. Although it is unclear as to exactly when, (A 64 - 67) there came a time when DiPalma was no longer able to pay what was alleged to have been interest of \$175 per week. (A 67)

According to DiPalma, he spent the next several weeks either "ducking" Riccardi or making partial payments. (A 68 - 69) On one occasion the witness was "stopped" by Riccardi as he drove in his car near a cemetery in Brooklyn. (A 70) At the trial DiPalma's testimony was that Appellant Gigliotti was with Riccardi at the time. (A 70)<sup>3/</sup> In commenting on DiPalma's failure to repay the loan, Riccardi was alleged to have stated that if he didn't pay he would be put in the hospital. (A 71) The witness then testified

3/ It is emphasized that this was DiPalma's trial testimony for, as will be seen, his Grand Jury testimony was significantly different with regard to this meeting.



that Gigliotti joined the conversation by stating that "Look...it doesn't pay for you to get hurt...Why don't you pay him? Or do what you can to pay him?" (A 71)

Two days later DiPalma met Riccardi again and tried to stall him with a bogus \$900 check. (A 72) Time, like borrowing, did not help DiPalma. Literally broke (A 72) the witness sought refuge at a local police precinct. (A 73) He was then referred to the District Attorney's Office (A 73) and eventually to the Federal Bureau of Investigation. (A 77)

While under police guard, the witness testified, Riccardi came to his door and shouted "Open up the door. We'll bust it down. You'd better pay..." (A 78) Despite the fact that policemen were in the house with drawn guns (A 78) no arrests were made. In fact, Police Sergeant James Oleska, testifying to this incident, was unable to identify any of the individuals who came to the door. (T a - 15)

One week after first speaking to agents of the Federal Bureau of Investigation, DiPalma again met Riccardi. (A 79 - 80) On this occasion Riccardi assaulted DiPalma with his fists. (A 80) As DiPalma was being beaten his wife appeared with a stick and chased Riccardi away. (A 81)

Testifying for the Government Joan DiPalma, the victim's wife, identified Riccardi as the individual who attacked her husband. (T 541) She also testified that when she appeared with a stick, Riccardi left. (T 542)

Following this encounter DiPalma met again with F. B. I. Agent Arthur Ruffels. Several days later, on June 2nd, 1972 Ruffels placed a transmitting device on DiPalma's body. (A 83) The Agent then drove DiPalma to a meeting with Riccardi. (T 94, 95) Agent Ruffels remained in the Government vehicle with an instrument which would record DiPalma's conversations. (T 95) While under Government surveillance, DiPalma first met Appellant Gigliotti. (A 94) DiPalma asked Gigliotti if he could see Riccardi. (A 94) After some initial conversation, Riccardi met DiPalma with Gigliotti present. (A 95) The recorded conversation then turned to the subject of the outstanding loan. (T 66)<sup>4/</sup>

Four witnesses, including F. B. I. Agent Ruffels, were called by the defendant Riccardi. Through these witnesses the defense attempted to elicit serious contradictions in DiPalma's testimony. The theme of Riccardi's

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<sup>4/</sup> The transcript of this taped conversation appears in the Appendix at page 402.



defense was that DiPalma was more active a bookmaker than he admitted and that his complaint to the Federal Bureau of Investigation was an attempt to avoid paying winners who bet with him. Appellant Gigliotti called no witnesses and did not testify.

#### QUESTIONS PRESENTED

1. Whether Appellant should have been held to answer these charges where the Grand Jury heard no evidence of his alleged participation in this crime?
2. Whether the evidence, considered in the light most favorable to the Government, was sufficient to sustain Appellant's conviction for aiding and abetting?

#### CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part that:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury..."

STATUTES AND RULES INVOLVED

Rule 7(a) of the Federal Rules of Criminal Procedure provides in relevant part that:

"An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information."

Title 18, United States Code, Section 894, provides in relevant part as follows:

"Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means,

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the non-repayment thereof, shall be fined not more than \$10,000 or imprisoned not more than 20 years, or both."

Title 18, United States Code, Section 2, provides in relevant part as follows:

"Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."



POINT 1

THE GOVERNMENT'S GRAND JURY PRESENTATION OF ITS CASE AGAINST RONALD GIGLIOTTI WAS WHOLLY INADEQUATE; THE FAILURE TO SUBMIT ANY EVIDENCE OF CRIMINALITY ON THE PART OF APPELLANT SHOULD HAVE RESULTED IN A RULING BY THE DISTRICT COURT THAT IT WAS WITHOUT JURISDICTION TO PROCEED WITH THE TRIAL.

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Ronald Gigliotti was sentenced to a prison term of eight years on a charge that he participated in the extortion of Frank DiPalma. By the jury's verdict this charge was proved, after trial, beyond a reasonable doubt. On Appeal Gigliotti challenges the sufficiency of the evidence against him. Appellant's broadest attack on his conviction, however, is that under the Grand Jury clause of the Fifth Amendment he should never have been "held to answer" these charges.

This is not a case where a defendant seeks review of the legality of the evidence presented to the Grand Jury. United States v. Calandra, 414 U. S. 338, 94 S. Ct. 613 (1974) Nor is this a case where the character or competence of the Grand Jury testimony is submitted for question. Costello v. United States, 350 U. S. 359, 76 S. Ct. 406 (1956); Lawn v. United States, 355 U. S. 339, 78 S. Ct. 311 (1958) Rather, this is a case, hopefully rare, where the Strike Force attorneys' submission of

evidence to the Grand Jury was so slipshod that it denied Appellant Gigliotti his Constitutional and Statutory right to have the evidence against him considered by a Grand Jury acting independently of the prosecutor. Assuming arguendo, however, that this presentation met Constitutional requirements, Appellant respectfully asks that this Court reverse his conviction and dismiss the Indictment under its supervisory power. United States v. Estepa, 471 F. 2d, 1132 (2nd Cir., 1972); United States v. Toscanino, 500 F. 2d 267 (2nd Cir., 1974); McNabb v. United States, 318 U.S. 332, 63 S. Ct. 608 (1943).

This case is presented for review at a time when members of both the legal and lay community continue to debate whether the Grand Jury properly functions as an independent shield between the citizen and the prosecutor. See, e.g.: The Grand Jury: True Tribunal Of The People Or Administrative Agency Of The Prosecutor. 2 N.M.L. Rev. 141 (1972)<sup>5/</sup> Focusing on the instant case, it will become clear that the manner in which the "evidence" against Gigliotti was presented lends firm support to the "rubber

<sup>5/</sup> A case recently decided by the California Supreme Court discusses whether Grand Jurors serve only as rubber stamps of the prosecutor. Johnson v. Superior Court; Calif. Sup. Ct., 9/19/75, 18 Cr. L. 2054 (October 15th, 1975)



stamp" theory. This then is not simply another case where a convicted defendant asks an Appellate Court to test the sufficiency or quality of the evidence before the Grand Jury. The cases which foreclose this type of review are legion. Costello v. United States, supra; Lawn v. United States, supra; United States v. Schwartz, 464 F. 2d 499 (2nd Cir., 1972). By implication, however, these cases presuppose a basic respect for the Grand Jury as a body acting independently, albeit under the direction of the prosecutor. When this basic respect is absent, such as where the Grand Jury is misled, Courts will not hesitate to act. United States v. Estepa, supra; United States v. Gallo, 394 F. Supp. 310 (D. Conn., 1975) ("Accordingly, courts must be ever vigilant to preserve the functions of the Grand Jury as an effective 'safeguard against oppressive actions of the prosecutor...'") Gaiter v. United States, 413 F. 2d 1061, 1066 (D.C. Cir., 1969) 394 F. Supp. at 313; United States v. Cox, 342 F. 2d 167, 170 (5th Cir., 1965). See also Daneals, 370 F. Supp. 1289 (W.D.N.Y., 1974).

What then occurred before the Grand Jury with respect to Appellant Gigliotti? Although not charged on

the face of the Indictment as such,<sup>6/</sup> Appellant was tried and convicted as an aider and abettor. Title 18, U. S. C., Section 2, (Charge p. 15). It will be remembered that Gigliotti's alleged participation in this extortionate credit transaction surfaced in two meetings with DiPalma, one near a cemetery on May 15th, 1972 and the second under the scrutiny of Federal Agents on June 2nd, 1972. Appellant will argue in his second point on this Appeal that his participation in these meetings was insufficient to sustain his conviction. But first, one must look to the evidence presented to the Grand Jury. For these are the people who, according to the Fifth Amendment, were ultimately to decide whether to indict Gigliotti.

The only evidence concerning Ronald Gigliotti before the Grand Jury came through the testimony of Frank DiPalma. DiPalma appeared before a Federal Grand Jury on three occasions, May 22nd and June 13th, 1972 and April 18th, 1973.<sup>7/</sup> A careful analysis of that testimony is in

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<sup>6/</sup> This Court has ruled that an Indictment may charge an aider and abettor as a principal. United States v. Russo, 284 F. 2d 539 (2nd Cir., 1960); United States v. Ramsey, 374 F. 2d 192 (2nd Cir., 1967)

<sup>7/</sup> Each of the transcripts of DiPalma's Grand Jury testimony is contained in its entirety in Appellant's Appendix. (A 8 - 43)



order.

DiPalma's first appearance before the Grand Jury took place on May 22nd, 1972 which was some ten days before the June 2nd meeting at which the conversations were recorded. At this first appearance DiPalma essentially read and swore to a statement he had previously furnished to F. B. I. Agent Ruffels. (A 10 - 11) In that statement DiPalma recounted the history of his alleged "extortionate credit transaction with Riccardi, then known to him only as "Zero". (A 11) With respect to individuals other than Riccardi, the statement referred to a meeting in November or December of 1971 where DiPalma complained that he could not keep current with the interest payments. (A 12) Two unidentified individuals were present at this meeting. In addition to describing their physical features DiPalma characterized both individuals as "Jewish looking". (A 12 - 13)

The statement then went on to describe the meeting of May 15th, 1971 which took place in Brooklyn near a cemetery. (A 14) Here another unidentified individual was present with Riccardi. Once again the unidentified individual was described as "Jewish looking". (A 14) It was clear, however, that this individual, because of

substantially different age and description was not one of the two previously mentioned unidentified individuals. (A 14) Significantly, this statement furnished some three days after the meeting made no mention of any statement made by Riccardi's unidentified companion.<sup>8/</sup>

On June 13th, 1972, DiPalma returned to the Grand Jury.<sup>9/</sup> As seen, there was no evidence whatsoever presented against Gigliotti on the first appearance, May 22nd. Certainly the prosecutor cannot be faulted for not presenting what he didn't have. The June 2nd meeting had not yet occurred. There was no tape. And curiously, Riccardi's "Jewish looking" companion on May 15th said nothing.<sup>10/</sup> On June 13th, however, the same prosecutor was better equipped. He then had the taped conversation which obviously lead to Gigliotti's conviction. This tape, however, was neither played for, nor was it considered by

<sup>8/</sup> This fact, of course, armed trial counsel with a key discrepancy on which to cross-examine. On Appeal, this fact is raised to show that the Grand Jury had no evidence of any alleged criminal participation on May 15th by Gigliotti.

<sup>9/</sup> In his first Grand Jury appearance, in reading his statement, DiPalma referred to the "cemetery" meeting as having occurred on May 15th, 1971. (A 14) On his second appearance this error was corrected and the meeting was placed on May 15th, 1972. (A 30)

<sup>10/</sup> This is regarded as curious because at trial some three years after the meeting DiPalma testified to a somewhat telling statement by Appellant.



the Grand Jury. Simply stated, they acted without it. Appellant does not now suggest that the Government was under an obligation to present all of its evidence to the Grand Jury. Nor does he suggest that the prosecutor must furnish his best evidence to the Grand Jury. It would seem, however, that the Government attorney is under an obligation to present some evidence to the Grand Jury on which they could find that there is probable cause that a particular individual had committed or participated in a particular crime.

This Court has held that an Indictment establishes probable cause and thus eliminates the need for a preliminary examination. Sciortino v. Zampano, 385 F. 2d 132 (2nd Cir., 1967). The Sciortino decision necessarily assumes that the Grand Jury is furnished with some evidence which could arguably support a finding of probable cause. With this in mind, we look to DiPalma's testimony before the Grand Jury on June 13th, 1972. At this time DiPalma again recounts the history of his relationship with Riccardi. He again testified to the manner in which the loan was made and then partially re-paid. Again, reference was drawn to a meeting in November or December of 1971 when he met Riccardi with two unidentified individuals.

(A 24 - 30) During this testimony the unidentified individuals were described as his partners in the shylocking business. (A 30) By his testimony neither of these two individuals were present with Riccardi on May 15th. In fact, on this appearance DiPalma drew reference to another unidentified individual to whom he allegedly repaid part of the Riccardi loan. (A 28, 29) With reference to the May 15th meeting DiPalma again recalled that a friend of Riccardi's was present. (A 29 - 30) There was again no mention of any words uttered by that friend. (A 29 - 30)

Later in his testimony DiPalma, for the first time under oath, recounted the events of June 2nd when he wore the transmitting device. DiPalma recalled that he first met an individual whom he identified at trial as Gigliotti. It is significant to note that Gigliotti was not identified in the Grand Jury. In fact, DiPalma's Grand Jury testimony on June 13th was that this person, later identified as Gigliotti, was previously unmentioned. In other words, at the trial DiPalma swore that Gigliotti was the same individual who was with Riccardi on May 15th. In the Grand Jury his testimony was substantially different. On June 13th he testified as follows:



"Q. Have you talked about that guy at all today? Is he one of the unknown persons you referred to in your answers, either the guy who used to get the money at the luncheonette or either of the two men inside the cycle shop?

A. No, he's not.

Q. This is a new person?

A. A new person." (A 34)

Again, this serious inconsistency between the Grand Jury and trial testimony is not pointed out to have this Court weigh the credibility of the witness; for purposes of this Appeal it demonstrates that there was no testimony before the Grand Jury about Gigliotti other than the testimony regarding June 2nd, 1972. At trial the petit jury considered two meetings at which Gigliotti was allegedly present. The Grand Jury obviously only considered the June 2nd meeting. The entire testimony concerning Gigliotti's alleged participation came as follows:

At page 17 of the transcript of DiPalma's Grand Jury appearance on June 13th, 1972 (A 34), the witness for the first time refers to the individual whom he identified at trial as Appellant Gigliotti. Attempting to find Riccardi, DiPalma "made arrangements" with Gigliotti and finally met him in the company of Appellant. According

to the witness, Riccardi's "friend" Gigliotti repeatedly told Riccardi that "Look, he has a family as well as you have and he has to make good." (A 36) This, of course, cannot be construed in any manner as an extortionate threat within the meaning of Section 891(7). The only other occurrence worthy of note was DiPalma's recollection that Riccardi told him that his friend had a gun and then instructed his "friend" to shoot him if he moved. (A36 - 37) There was, however, no evidence that the "friend" either had a gun or joined in this threat. The totality then of the Grand Jury evidence against this fifth unidentified individual<sup>11/</sup> was the statement not to the alleged victim but to Riccardi that "Look, he has a family as well as you have and he has to make good".

On DiPalma's third appearance before the Grand Jury, nearly one year later on April 18th, 1973, the witness merely re-affirmed his earlier testimony furnished on May 22nd and June 13th, 1972. (A 41)

<sup>11/</sup> The witness DiPalma had previously referred to two unidentified individuals at the cycle shop, allegedly Riccardi's partners in the shylock business and an unidentified individual to whom he allegedly made payments at the luncheonette. At the time of his Grand Jury testimony the individual who accompanied Riccardi on May 15th, 1972 was not the same person he met on June 2nd, 1972. On the basis of this testimony Gigliotti is the fifth unidentified individual referred to in the Grand Jury.



From a review of the Grand Jury proceeding two problems emerge. First there was absolutely no evidence of criminality on the part of Ronald Gigliotti. Secondly, Gigliotti was not identified before the Grand Jury. There may be cases where the failure to identify a prospective defendant before the Grand Jury may not constitute a Constitutional violation. United States Ex Rel Curtis v. Warden of Greenhaven Prison, 463 F. 2d 84 (2nd Cir., 1972). In deciding the Curtis case this Court relied upon its earlier decision in United States Ex Rel Morrison v. Forster, 175 F. 2d 495 (2nd Cir., 1949). The Curtis Court ruled that

"In the light of Morrison, the contention that it violated due process merely to fail to provide the grand jury with a description of petitioner, where the jury must have realized it was indicting a specific individual, known to the testifying officers (albeit by the false name Henry) for a specific narcotics transaction, must fail." 463 F. 2d at p. 87

In the instant case the Grand Jury heard testimony about arguably four and possibly five unidentified persons who may have been considered accomplices of defendant Riccardi. Quite significantly, the Indictment in this case charged that Gigliotti's participation came between May 1st, 1971 and May 18th, 1972. There is no argument

here that the Appellant did not receive fair notice of the charges against him. However, it should be remembered that the Grand Jury heard absolutely nothing about Gigliotti, even as an unidentified person, during that time period. The only evidence of his involvement referred to June 2nd, 1972. During the time period pleaded in the Indictment other unidentified individuals were mentioned. The bare bones question, therefore, is that on the evidence before the Grand Jury, how was a true bill returned against Ronald Gigliotti? Stated another way, how can it be determined from the Grand Jury proceeding that they intended to indict Ronald Gigliotti? If the procedure in this case is sustained, it would allow the prosecuting attorney while physically preparing the Indictment, to insert the name of any individual whom he considered as a candidate to fit the slot of one of the unidentified individuals referred to in the Grand Jury.

Appellant's argument, therefore, becomes two dimensional. His first allegation is that without regard to the identification problem, there was no evidence presented to the prosecutor on which an Indictment could be based. The tape recording was not played for the jurors, nor was the transcript shown to them. There was absolutely



no evidence that Gigliotti had a stake in this alleged criminal venture. To indict Gigliotti, therefore, was obviously a unilateral determination made by the prosecutor upon a review of evidence which the Grand Jury had never heard or seen. Obviously presentations to the Grand Jury must be the product of a prosecutor's discretion as the exercise of that discretion conforms to his oath of office. However, to obtain an Indictment without a proper presentation to the Grand Jury renders the Grand Jury process meaningless and supports the so-called "rubber stamp" theory. Clearly, Appellant's argument is not a philosophical one that all Grand Jury action is merely a stamp of approval on the prosecutor's choice of defendant. Here the argument is a pragmatic one. The Grand Jury returned an Indictment without any evidence that one of the two persons indicted had violated the statute in question. This problem is then compounded by the fact that there is now no basis to determine whether the Grand Jury knew who they were indicting.

The latter problem would be easier of solution if the prosecutor's remarks and instructions to the Grand Jury were now available for review. The only basis on which to now assess this matter is the prosecutor's repre-

sentations during the trial and at the time of sentence.

The issues raised herein were raised by trial counsel in the District Court immediately after he recieved the Grand Jury testimony. By virtue of the secrecy requirements of the Grand Jury and relevant statute, Title 18, U. S. C., Section 3500, counsel's first opoortunity to review this testimony came during the trial. Prior to the conclusion of DiPalma's direct testimony the following record was made:

"Mr. Newman: Then I would ask Your Honor to do something else, if you will. I would ask Your Honor to look at the Grand Jury testimony that's been adduced here for this reason, Judge: maybe this is premature, but if you would look at the grand jury testimony, which I assume is the grand jury we've been furnished as 3500 material, of Mr. DiPalma, I would respectfully ask Your Honor to dismiss as far as Mr. Gigliotti is concerned on the grounds, Judge, that no evidence was adduced in that grand jury against Mr. Gigliotti; none.

I submit to Your Honor Mr. Gigliotti has a Sixth Amendment right [sic] right to be indicted by a grand jury which has evidence against him.

The Court: This kind of motion you make at the end of the plaintiff's case, not during the course of the trial." (A 89)



At the end of the Government's case counsel again moved for dismissal of the Indictment on the basis of an inadequate Grand Jury presentation. (A 370) Counsel then stated that

"[Gigliotti] is not identified but assume for a moment he is, there was nothing said in the way of a criminal nature.

He never, obviously, waived Indictment and there is no other evidence in this record--when I say this record, I'm sorry--grand jury record, either indicting him, indicating he is involved in any criminal activity and I think he was deprived of his Constitutional rights." (A 371)

Continuing with the trial record, the Court sought to determine how Gigliotti was indicted.

"The Court: Mr. Newman appreciates all that and so do I. But, what he said was--and it is puzzling to me--is how the grand jury came up with the name of Gigliotti.

Mr. Naftalis: The Government supplied them with that name.

The Government drafts the Indictment. That is known to the defense and the Court.

The Court: I understand that but based upon no identification, no nothing--I mean, did Mr. Ruffels take the stand before the grand jury and say 'this third man'--

Mr. Naftalis: I don't believe he did--

The Court: (continuing) - this second man is Gigliotti'? That's what Mr. Newman is asking and I think it is possibly a bona fide question.

What he is saying, if all you have got is what you have here and Mr. Murphy went in and said 'The other guy involved is Gigliotti. Return an Indictment against him,' he says that is improper and I am not sure it is not improper. That would bother me.

If the F.B.I. went in and testified that the third man or his identity is based on the investigation that was done on Mr. Gigliotti, I don't think I'd have a problem with it." (A 375 - 376)

Later, with regard to Gigliotti, the Court stated that

"The other man wasn't identified. Nobody was identified. That's not even tied in to the original guy as far as the grand jury is concerned. That could be three separate people. Mr. Newman says that might be you, me and him for all we know."  
(A 382)

At the end of the Government's case the Trial Court reserved decision on the defendant's Motion to dismiss. (A 382) At the time of sentence, after memoranda had been submitted by both sides the Motion was denied and the judgment of conviction was entered. In denying



this Motion the Court relied upon representations by the prosecuting attorney contained in a post-trial Memorandum submitted in opposition to Gigliotti's Motion to dismiss. In this Memorandum<sup>12/</sup> the Government contends, as undoubtedly they will on Appeal, that "evidence was offered to this Grand Jury concerning the criminal involvement of defendant Ronald Gigliotti". (A 395) Reference is then made to the testimony of May 22nd, 1972 at page 7 of the transcript. Indeed, DiPalma at time of trial, testified to some participation by Gigliotti on this date. However, as far as the Grand Jury knew there was no reason to believe that the second individual on this date was Gigliotti and moreover, Riccardi's companion was not alleged to have made any statement.

The Memorandum then refers to DiPalma's testimony before the Grand Jury on June 13th, 1972. Here, as indicated above, there is no evidence of criminality on the part of Gigliotti. The Government nevertheless relies upon the fact that

"Fuller testimony from the witness DiPalma plus photographs and a sound recording of this meeting were offered by the Government during the course of the trial itself." (A 395)

<sup>12/</sup>The Memorandum is contained in Appellant's Appendix at page 394.

If, however, the defendant was denied his Constitutional right to be charged by a Grand Jury, the evidence at trial cannot salvage that Constitutional violation. Appellant submits that the Fifth Amendment Indictment requirement is jurisdictional. In Ex Parte Bain 121 U. S. 1, 7 S. Ct. 781 (1887) the Court stated that:

"We are of the opinion that an indictment found by a grand jury was indispensable to the power of the court to try the petitioner for the crime with which he was charged." 7 S. Ct. at page 787.

It is clear, therefore, that the Government may not rely upon either the verdict or its proof at trial to salvage an otherwise Constitutionally infirm beginning to the prosecution.<sup>13/</sup>

More significantly the Government's post-trial Memorandum injected new facts:

<sup>13/</sup>There is language in United States Ex Rel Curtis v. Warden of Greenhaven Prison, supra, that a jury's finding of guilt beyond a reasonable doubt may cure a defective Indictment. This case, as well as the Morrison case, are both habeas corpus applications which arise from a New York State criminal prosecution. The "Grand Jury clause" of the Fifth Amendment is not applicable to the States. Hurtado v. California, 110 U. S. 516, 4 S. Ct. 111 (1884) "On a Federal Constitutional basis the Fifth Amendment is clear that "no person shall be held to answer...unless on a presentment or indictment of a Grand Jury..." (Emphasis supplied) From a plain reading of the Amendment's language it would seem that the matter is jurisdictional.



"At the time of the submission of that indictment counsel for the Government identified defendant Gigliotti as the perpetrator of the acts noted in the Grand Jury testimony above. Counsel asked the Grand Jury if it needed any additional identification of either defendant and the Grand Jury indicated that it needed no further identification of either defendant. Counsel for the Government indicated in his statement to the Grand Jury that the F.B.I. had identified defendant Ronald Gigliotti as the person described by DiPalma in his Grand Jury testimony. Based on this representation by counsel for the Government and the direct testimony of the victim of the extortion crimes the Grand Jury indicted the above named defendant. United States submits that there was sufficient non-hearsay evidence before the Grand Jury to uphold this indictment. Further the United States submits that the hearsay statement of Government counsel before the Grand Jury as to the identity of Ronald Gigliotti was labeled as hearsay and understood to be so by members of the Grand Jury at the time the indictment was voted upon." (A 395 - 396)

These statements which are represented to have been made by Government counsel were not recorded. (A 421)

Nearly three years ago, this Court in United States v. Peden, 472 F. 2d 583 (3rd Cir., 1973) stated that it would be the "better procedure" to have the prosecutor's statements to the Grand Jury recorded. The Court stated, however, that absent unusual circumstances the mere failure to record will not require reversal.

This case, however, is markedly different. Here the crucial question was how did Gigliotti get indicted on the basis of the testimony before the Grand Jury? The record of the Grand Jury proceeding does not supply the basis on which the Indictment was voted. With all due respect, the very purpose of the Grand Jury system is to avoid complete reliance on the prosecutor. Where, as here, that reliance is so critical, it would not seem proper to rest on remarks that were not recorded and which cannot now be objectively reviewed.

It is clear then that this is not simply an issue of inadequate identification. Although Appellant submits that on the facts of this case the identification was inadequate, the more serious issue is the complete lack of any evidence of criminality on Gigliotti's part. Taken together it becomes certain that the Grand Jury did not in this case serve as a buffer between the prosecutor and the citizen. Stirone v. United States, 361 U.S. 212 80 S. Ct. 270 (1960); Russell v. United States, 369 U. S. 749, 82 S. Ct. 1038 (1962); Orfield, The Federal Grand Jury, 22 F. R. D. 343, 394 (1959). Recently, in Gerstein v. Pugh -- U. S. -- 95 S. Ct. 854 (1975), the Supreme Court reiterated the principle that prosecutorial



judgment without independent review cannot pass Constitutional muster. Reduced to its simplest terms, this was a case where a defendant was brought to trial solely on the basis of prosecutorial judgment. The Grand Jury heard no evidence of a crime committed by Gigliotti. Further, identification of Gigliotti as a participant in the crime came through the representations of the prosecutor himself. This was not the same as putting an investigator on the stand to give hearsay testimony. This was a case where obviously the prosecutor collected all the relevant facts and obtained an Indictment on the basis of what he knew. Very little, if anything of what he knew, was presented to the Grand Jury. Here then the Grand Jury did not serve as an independent investigative body reviewing the evidence submitted by the prosecution. Here, with rare insight, we realize that the Grand Jury merely parroted the judgment of the prosecutor. This type of procedure, it is submitted, is Constitutionally intolerable.

POINT II

THE EVIDENCE CONSIDERED IN THE LIGHT  
MOST FAVORABLE TO THE GOVERNMENT IS  
INSUFFICIENT TO SUSTAIN APPELLANT'S  
CONVICTION FOR AIDING AND ABETTING.

Appellant, Ronald Gigliotti, next contends that the evidence against him, considered in the light most favorable to the Government,<sup>13/</sup> was insufficient to sustain his conviction on count Two as an aider and abettor. More particularly, Gigliotti contends that his alleged participation in two meetings between DiPalma and Riccardi on May 15th, 1972, did not rise to the level of a violation of Federal Statute. Plainly stated, there was nothing here on which a reasonable man might fairly conclude guilt beyond a reasonable doubt. United States v. Taylor, 464 F. 2d 240 (2nd Cir., 1972)

At trial DiPalma testified that he first met Gigliotti on May 15th, 1972. According to the witness this meeting occurred several months after a lender-debtor relationship began with defendant Riccardi. There is, prior to this meeting, absolutely no evidence of involvement on Gigliotti's part.

On May 15th, 1972, the witness testified for  
<sup>13/</sup> Glasser v. United States, 315 U. S. 60, 62 S. Ct. 457 (1942); United States v. Tutino, 269 F. 2d 488 (2nd Cir., 1959).



the first time, Gigliotti was Riccardi's companion.

(A 70 - 71) DiPalma testified that after Riccardi threatened to put him in the hospital, Gigliotti joined the conversation:

"A.  Ciro Riccardi asked me where have I been.  I told him I'd been around.  'I haven't had a chance to come down and see you yet.'

He told me that if I don't get this money up he's going to put me in the hospital where no doctor bills are going to be able to pay for it.

Q.  What did you say then?

A.  I says, 'Well, I'm having a hard time.'

He says he's having a hard time, too, doesn't want to know about my hard times.

Q.  What if anything else did he say?

A.  When he said that, the gentleman there with the brown suit [Gigliotti] said, 'Look,' In the words of this, he said, 'it doesn't pay for you to get hurt.' He said, 'Why don't you pay him? or do what you can to pay him?' Then he says, 'Go ahead and go.'

I left that day, went back home." (A 71)

Following this meeting, DiPalma met with Riccardi on some three occasions when Gigliotti was not present. (A 72, 78 & 80) Finally, the matter culminated

in the June 2nd meeting when Gigliotti was again present. (A 83) The Government alleged that everything that transpired during this meeting was recorded on tape. Therefore, to judge the extent of Gigliotti's participation we must refer to that recording. By his testimony DiPalma first met Gigliotti on that date. The tape reflects that fact. The beginning of the tape also reflects a very significant statement made by Gigliotti to DiPalma prior to the time that they joined Riccardi. The transcript of this recording appears in Appellant's Appendix at pages 402 through 417. On that transcript the fifth statement attributed to Gigliotti is set forth as follows:

"Talking to you is like talking to nobody. I just - I hang out here - about four or five blocks away." (A 402)

Cross-examination of Agent Ruffels, however, drew an admission that the transcript was in error.

"Q. You had occasion, together with all of us,--after all the difficulties were ironed out--to listen to the tape.

A. Yes, sir.

Q. And as a result of listening to it, did you notice that instead of the word, 'you,' it should be the word 'me', and it should read, 'talking



to me is like talking to nobody. I just - I hang out here--about four or five blocks away.'

Did you notice that, sir?

A. Yes, sir. I am sorry. I did not.

Q. All right.

Mr. Newman: Your Honor, with your permission, I request some guidance. I would like at his convenience for him to listen to the tape again, Mr. Ruffels, and I would like to see if it refreshes his recollection with particular reference to that line.

The Court: We can do that at the recess.

Mr. Newman: All right." (A 134 - 135)

Later, under re-cross examination trial counsel elicited the following:

"Q. And your original transcript had on it, 'talking to you is like talking to nobody.' And this is supposed to be Gigliotti talking.

'I just hang out here--about four or five blocks away.'

Right?

A. Right.

Q. And now you listened to it during this recess?

A. Right.

Q. Is your recollection refreshed that instead of 'talking to you,' it should be, 'talking to me is like talking to nobody. I just hang out here--about four or five blocks away.'

A. What specifically would you like me to --

Q. Well, should the 'you' be 'me'?

A. Yes.

Q. And that 'me' refers to Ronald Gigliotti telling Frank DiPalma that 'your talking to me about this is like talking to nobody,' right?

A. Yes." (A 174 - 175)

Following this statement, the conversation turned to DiPalma's imminent meeting with Riccardi. When DiPalma voiced some reluctance about going with Gigliotti to meet Riccardi, Appellant stated that

"Listen--we're not going to no house. He's waiting for you outside. I don't give a fuck. It don't make no difference to me. I'll tell him you can't make it." (A 403)

When DiPalma stated that he would like to walk to the meeting rather than go with Gigliotti the following was recorded:

"Di Palma: I'll walk up.

Gigliotti: All right, let's see, you want to walk it? I'll tell you which way to go." (A 404)



When Riccardi finally met DiPalma the conversation immediately turned to the subject of the loan. It does appear from the transcript that Riccardi drew reference to a gun.

"Z: (Riccardi) You stand right next to him--if he does anything shoot him right in his fucken head--I'm telling you something over here if you'd have come to me like a man and you wouldn't try to hide like a rat -" (A 407)

As previously stated, however, Gigliotti did not join in this threat nor was there any evidence that he carried a gun. At page 9 of the transcript Gigliotti enters the conversation. There is, however, nothing more than plaintiff remarks about DiPalma's failure to repay Riccardi.

There is, then, nothing in DiPalma's testimony or in the taped conversation of June 2nd to support a finding that Gigliotti had a stake in this alleged criminal venture. United States v. Johnson, 513 F. 2d 819 (2nd Cir., 1975); United States v. Falcone, 109 F. 2d 579 (2nd Cir., 1940). Considering the evidence in this case, Gigliotti's meetings with DiPalma were shown to be nothing more than fortuitous. On the two occasions in question the Government proved nothing more than that Gigliotti was a companion of Riccardi. In United States v. Gargulio, 310

F. 2d 249, 253 (2nd Cir., 1962) this Court stated that:

"Yet, even at an age when solitude is so detested and 'togetherness' so valued, a jury could hardly be permitted to find that the mere furnishing of company to a person engaged in crime renders the companion an aider or abettor."

In the instant case, the prosecution established only that Gigliotti was a friend or companion of Riccardi. This was clearly insufficient to support a finding beyond a reasonable doubt, that Gigliotti participated in the crime charged.

#### POINT III

PURSUANT TO RULE 28(i) OF THE FEDERAL RULES OF APPELLATE PROCEDURE APPELLANT RONALD GIGLIOTTI RESPECTFULLY JOINS IN ARGUMENTS RAISED ON BEHALF OF HIS CO-DEFENDANT CIRO RICCARDI INsofar AS THEY ARE CONSISTENT WITH THE ARGUMENTS RAISED HEREIN.

#### CONCLUSION

For the foregoing reasons it is respectfully submitted that Ronald Gigliotti's conviction should be reversed and the Indictment dismissed.

Respectfully submitted,

La Rossa, Shargel & Fischetti  
Attorneys for Defendant-Appellant  
Ronald Gigliotti

James M. La Rossa  
Gerald L. Shargel  
On the Brief

Gustave H. Newman  
Of Counsel



UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,  
- against -

RONALD GIGLIOTTI,

Defendant-Appellant.

Index No.

Affidavit of Personal Service

STATE OF NEW YORK, COUNTY OF

NEW YORK

ss.:

I, **James A. Steele** being duly sworn,  
depose and say that deponent is not a party to the action, is over 18 years of age and resides at  
310 W. 146th St., New York, N.Y.

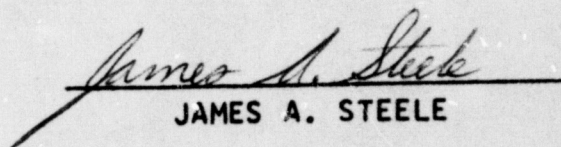
That on the 24th day of October 1975 at 225 Cadman Plaza, Brooklyn, N.Y.

deponent served the annexed Appellant Brief upon

David G. Trager

the Attorney in this action by delivering <sup>2</sup> <sup>5</sup> a true copy thereof to said individual  
personally. Deponent knew the person so served to be the person mentioned and described in said  
papers as the herein,

Sworn to before me, this 24th  
day of October 19 75

  
JAMES A. STEELE

ROBERT T. BRIN  
NOTARY PUBLIC, State of New York  
No. 31-0418950  
Qualified in New York County  
Commission Expires March 30, 1978